

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION - LOS ANGELES

CORY SPENCER, ET AL.,)	CASE NO: 2:16-CV-02129-SJO-RAOx
)	
Plaintiffs,)	CIVIL
)	
vs.)	Los Angeles, California
)	
LUNADA BAY BOYS, ET AL.,)	Thursday, October 12, 2017
)	
Defendants.)	(10:12 a.m. to 11:55 a.m.)

HEARING ON MOTION FOR SANCTIONS [425][468]
AND GRANTING DEFENDANTS FRANK FERRARA'S AND CHARLIE FERRARA'S
APPLICATION FOR LEAVE FOR IN CAMERA REVIEW [486]

BEFORE THE HONORABLE ROZELLA A. OLIVER,
UNITED STATES MAGISTRATE JUDGE

Appearances:	See Next Page
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1 Los Angeles, California; Thursday, October 12, 2017; 10:12 a.m.

2 (Call to order)

3 THE CLERK: Calling Case Number cv-16-2129, *Spencer*
4 *versus Lunada Bay Boys*. Counsel, please enter your appearance
5 for the record.

6 MS. WOLFF: Good morning, your Honor, Samantha Wolff
7 and Kurt Franklin on behalf of the Plaintiffs.

8 THE COURT: Good morning, good morning.

9 MS. HURLEY: Good morning, your Honor, Alison Hurley
10 on behalf of Defendants Charlie Ferrara and Frank Ferrara.

11 THE COURT: Good morning.

12 MS. HURLEY: Thank you.

13 MS. LUTZ: Good morning, your Honor, Tera Lutz on
14 behalf of Defendant Sang Lee.

15 THE COURT: Good morning.

16 MR. CROWLEY: Good morning, your Honor, Daniel
17 Crowley, Booth Mitchel and Strange, also on behalf of Sang Lee.

18 THE COURT: Good morning.

19 MR. STOBART: Good morning, your Honor, John Stobart
20 for Brant Blakeman.

21 THE COURT: Good morning. All right, that's
22 everybody. All right, please be seated, please be seated. All
23 right, I'm going to begin in a way that I think should be
24 familiar to many of you, which is just to make sure that I have
25 reviewed everything that the parties have submitted in

1 preparation for today's hearing. We are here today on
2 Plaintiffs' motion for sanctions against Defendants Charlie
3 Ferrara, Frank Ferrara, and Sang Lee, and that's docketed at
4 468. And then a notice of errata at 470. Attached to the
5 motion are -- is Ms. Wolff's declaration as well as exhibits
6 that are described in the declaration. I have also reviewed
7 the opposition filed by Charlie and Frank Ferrara, and the
8 opposition file by Sang Lee, 472, 473; the declaration of
9 Mr. Morales in support of the opposition, and that's at 474.
10 I've also reviewed the replies filed by the Plaintiffs, the
11 reply to the Ferrara's opposition as well as the reply filed to
12 Mr. Lee's opposition. Additionally, there were objections and
13 responses, two objections to evidence relied upon in support or
14 in opposition of the motion, and that is at 479, 480, as well
15 as 485. Let me begin first with Ms. Wolff. So I've reviewed
16 all that material, the declarations and all of the exhibits
17 referenced therein. Is there anything else, any other filings
18 that I've omitted?

19 **MS. WOLFF:** The only thing I would add, your Honor,
20 is -- and you may have reviewed it but I didn't hear, was the
21 declaration of William Kellerman.

22 **THE COURT:** Oh, yes, I did, thank -- yes.

23 **MS. WOLFF:** Okay, thank you.

24 **THE COURT:** Okay, thank you. Ms. Hurley, anything
25 else that I should have reviewed in preparation that you didn't

1 hear me itemize?

2 **MS. HURLEY:** Yes, your Honor. We did submit an
3 errata and a correction to my declaration which is Docket
4 Number 484-1. There were -- there was a scanning issue with my
5 office, and my apologies, some of the exhibits were omitted
6 from the initial version. So the corrected version contained
7 those missing exhibits.

8 **THE COURT:** Yes, I did see that, okay.

9 **MS. HURLEY:** Thank you, your Honor.

10 **THE COURT:** Thank you very -- Ms. Lutz?

11 **MS. LUTZ:** And same thing, I don't know if you got a
12 chance to also review, it was attached to my motion, the
13 declaration of Giselle Morales (phonetic).

14 **THE COURT:** I did, yes, thank you, yes, thank you.
15 All right, so I think there are as I view it some preliminary
16 issues that we need to address before -- and the conclusions or
17 the findings then dictate how the Court proceeds under Rule 37.
18 And I guess my first what I see as a threshold issue is when
19 the duty to preserve attaches. And I have reviewed the
20 parties' filings of course. I've reviewed the exhibits in the
21 -- that were attached. I've also reviewed the docket. And so
22 why don't I begin first with the Ferraras? So we have the
23 appearance by attorneys for Frank and Charlie Ferrara at a
24 scheduling conference in August of 2016. We also have a proof
25 of service that was sent to Frank Ferrara and Charlie Ferrara

1 in late July. It was dated July 26th; the proof of service is
2 filed with the Court I believe July 29. So it seems to me that
3 that date, in other words late July, is a date, Ms. Hurley,
4 that the Court could without serious objection I think use to -
5 - as a date for when the Ferraras knew about and had a duty --
6 not only knew about but had a duty to preserve.

7 **MS. HURLEY:** Would you like response? Your Honor, --

8 **THE COURT:** Yes, please.

9 **MS. HURLEY:** -- well, these are laypeople, they --
10 and we don't have any evidence that that delivery occurred on a
11 date -- we don't know what date it occurred, if ever, between
12 July 29th, when I believe the UPS was deposited by counsel for
13 Plaintiff, and August 29th, when the Ferraras ultimately appear
14 in the case. And during that time period, the intervening four
15 or five weeks, they are not represented by counsel. They are
16 laypeople who are not sophisticated, are not attorneys, aren't
17 even business people in terms of somebody who comes in to desk
18 every day, reads documents, and has an understanding of what a
19 preservation obligation might entail as a layperson. So given
20 the fact that there's no evidence of actual receipt and notice
21 of their obligations under the Code to make any preservation
22 until August 29th, there's insufficient evidence to demonstrate
23 it could have attached at any point in time before then. And
24 given the allegations in the complaint, which as set forth in
25 our motion, there's no evidence -- and I agree that there's

1 some evidence that has not been recovered and is not
2 recoverable that we can't review to make this conclusion, but
3 there's no other evidence that the Ferraras communicated on
4 topics relevant to this case with other defendants. The
5 communications cited are among other parties to the action. So
6 as laypersons receiving a copy of a lawsuit in the mail before
7 they speak with their insurance adjuster or their attorney,
8 they don't have an understanding that text messages may be
9 relevant to a lawsuit because they don't have a complete
10 understanding of what exactly the claims mean against them.
11 And unless and until they have an opportunity to appreciate
12 that and understand it by working with counsel, it's very harsh
13 to impose a preservation obligation under Federal law upon
14 these two laypersons, one of whom has a traumatic brain injury,
15 and that's Charlie who's the person that disposed of his phone
16 two weeks before the appearance in this case, which he freely
17 admits. So my -- based on the facts available and the
18 applicable law, I don't believe that we can for the purposes of
19 this motion say that the preservation obligation attached to
20 either of them until August 29th.

21 **THE COURT:** Okay, so the -- so if we unpacked it a
22 little bit, I think there's enough in the record, and that's
23 unrebutted I would say, that the Ferraras knew about the
24 lawsuit by the end of July because I think you have the proof
25 of service and, again, it's unrebutted that they didn't

1 (phonetic) receive a copy of it. I think so then you're -- it
2 sounds like what your argument then would be that as laypeople,
3 that even if the Court finds that they did know about the case
4 at that point, then they didn't have a duty to preserve until
5 later in August, August 29th would be your date.

6 **MS. HURLEY:** I would agree, your Honor, but I don't
7 know that it's unrebutted. We have a proof of service and I --
8 and in terms of the burden of proof that Plaintiffs have on
9 this motion, we do not have to overcome some assumption that's
10 made that the receipt was delivered or the proof was delivered
11 to the Ferraras in order to avoid a sanction, which is being
12 requested in this motion. But, yes, I would say that as
13 laypersons, even if we do assume that they received it the
14 following day, their understanding of what they were and were
15 not supposed to do with things that they may not even have
16 realized were potential evidence in this case I think cannot be
17 fully attached until the date that they appear with counsel,
18 which is August 29th.

19 **THE COURT:** Okay, and is it because -- is it the fact
20 of having counsel or is it somehow the fact of having appeared
21 in court that the duty attaches?

22 **MS. HURLEY:** Well, I believe it would be having
23 counsel. But the engagement occurred very close in time to do
24 that, and it was not before Charlie Ferrara disposed of his
25 cellphone.

1 **THE COURT:** Okay, all right. So then some -- around
2 the time that counsel is retained, that would be your position.

3 **MS. HURLEY:** I think correct, upon meeting -- the
4 first meaningful meeting with the parties. So it may not even
5 be the date of the appearance, but I think there is an
6 understanding and a delivery of the information to the Ferraras
7 from their counsel. So it may not even be the 29th, it may be
8 within a few days of that when a meaningful communication has
9 happened advising them of their duties. But we're still
10 talking about a time period several weeks before that when
11 Charlie Ferrara traded in his prior cellphone for a different
12 phone. And again, your Honor, I would stress that Charlie
13 Ferrara is not somebody who has the mental capacity anywhere
14 near an attorney. He was hospitalized for six months with a
15 traumatic brain injury to the point where he didn't even have a
16 cellphone. And this -- it was several years before the facts
17 that are relevant to this case. But he's not someone
18 functioning on a level that an attorney would or even maybe a
19 college student. He's somebody who admits to struggling
20 because of this brain injury.

21 **THE COURT:** Okay. But there's no -- there's been no
22 indication throughout that this is someone who needs perhaps a
23 GAL or something like that appointed to represent him or assist
24 him.

25 **MS. HURLEY:** No --

1 **THE COURT:** I mean, he's not -- we're not at that
2 level of questioning his competency.

3 **MS. HURLEY:** No, your Honor, but I do think --

4 **THE COURT:** Okay.

5 **MS. HURLEY:** -- that the level of understanding a
6 person in his condition has is going to be a little bit
7 different than an attorney who's aware of the obligations under
8 the Code. And I would just ask your Honor to take that into
9 consideration with respect to Charlie's actions and whether
10 there was any intent behind it, and whether he had any reason
11 to believe there was a preservation obligation, which there's
12 just no evidence submitted in support of that.

13 **THE COURT:** Okay. All right, and then with Mr. Lee,
14 it's an easier factual record. We have the service I think
15 June 21 and then we have a litigation hold July 4.

16 **MS. LUTZ:** Right.

17 **THE COURT:** And we do have though -- Ms. Lutz, we do
18 have text messages or information that was not preserved after
19 that date, as I look at the information. We have some in late
20 July.

21 **MS. LUTZ:** So there are text messages in late July,
22 but I think the point that we have to focus on there is Mr. Lee
23 preserved his cellphone in early, mid-August. The text
24 messages that are in late July, there's no indication that they
25 were deleted by him and that they were overwritten by the

1 cellphone itself. If we look at the extraction report, we can
2 see which text messages were deleted and which ones were not.
3 And none of the text messages between Mr. Lee and any of his
4 codefendants during that July time period are indicated as
5 deleted.

6 **THE COURT:** But there's a duty to preserve, right?
7 So I guess I don't -- and this will -- maybe we'll get into it
8 right now. But it seems to me looking at the evidence and the
9 declarations that something has to be flagged for deletion for
10 it to be overwritten.

11 **MS. LUTZ:** That's not correct, your Honor. That is
12 one of the ways that it can be overwritten. But one of the
13 more likely possibilities is that storage on the phone is --
14 there's only so much storage that a phone can take in and that
15 phone will start deleting things on its own when there's not
16 enough storage on the phone. So there's no indication that
17 just because something was flagged as deleted that it would
18 automatically become overwritten on the phone. And also,
19 again, none of the text messages between Mr. Lee and any of the
20 codefendants were flagged as deleted, so there's no reason that
21 they would have been overwritten by the phone any time earlier
22 over any text messages and later over any others. It just is
23 something that the phone does and it's something that happened
24 that was outside of Mr. Lee's control.

25 **THE COURT:** And so the duty to preserve, I guess how

1 far do you think the duty to preserve goes, though? I mean, is
2 it just so the system overrides it --

3 **MS. LUTZ:** Right, and there's nothing that he can do
4 about that. I think that the duty to preserve is something
5 that, you know, if there's text messages that he can control to
6 somehow save, then he can do that. But there is no way to do
7 that. And as long as he didn't delete those text messages,
8 there's no indication that he did anything with knowledge in
9 order to get rid of them or to have them removed from his
10 phone. It's just something that the phone does on its own.
11 There's no indication to Mr. Lee like, hi, there's text
12 messages are about to get deleted. The phone doesn't give
13 communication like that to him. They just are overwritten by
14 the phone.

15 **THE COURT:** Okay, all right. Let me -- before we
16 actually get into that, let me turn to Ms. Wolff. So the -- as
17 I see it, the date that you would like to use for when the duty
18 attached is earlier, around the time of the filing of the
19 lawsuit. And so for Frank Ferrara, I see in his deposition
20 testimony that he acknowledges talking to Sang Lee in late
21 March or maybe early April. We can't really -- there's not a
22 precise date about the lawsuit. So I think that you have that.
23 I guess the question though there is do the rules -- there's a
24 reason why people -- why the rules require service, right, so
25 that someone has knowledge that he or she is named, what the

1 claims are, the factual allegations, etcetera. So I guess I --
2 notwithstanding that there are these articles, Mr. Ferrara's
3 own deposition testimony acknowledging that he discussed with
4 Mr. Lee the lawsuit, I don't -- I guess I still don't see -- I
5 don't get from there to why the duty to preserve attaches that
6 early.

7 **MS. WOLFF:** Yes, and I'd be happy to address that,
8 your Honor. So the standard isn't that the preservation
9 obligation arises upon service. That's just not the standard.
10 The standard is when a litigant has -- I'm sorry, when a person
11 has reason to know that litigation may arise. It's
12 prelitigation even that the standard can arise. And the rules
13 say -- the advisory committee notes say that somebody can
14 become aware of that through a variety of means, not just
15 service. So to suggest that the preservation obligation arises
16 only upon service is just not the standard under the Federal
17 rules. In fact, the obligation arises well before service.
18 And here though the -- I understand the point about they need
19 to understand what the obligation is and --

20 **THE COURT:** Right.

21 **MS. WOLFF:** -- what the contours are of what is
22 expected to be preserved. But Frank Ferrara clearly knew that;
23 because in his conversation with a reporter at some point
24 before April 7th, he discussed the specifics of the litigation,
25 the claims, the parties. Those are specifics that he

1 discussed. And he acknowledges that in his deposition
2 testimony about how there were claims that the Bay Boys
3 communicated to and conspired to exclude outsiders. Certainly
4 a lay person should know that when you're being accused of
5 communicating to do something against the law, those
6 communications are relevant to whatever lawsuit has been filed
7 against you. It doesn't take an attorney to explain that to
8 somebody.

9 In terms of Ms. Hurley's statements about Charlie
10 Ferrara's brain injury and the impacts it's had on him, there's
11 absolutely no evidence in the record of that. It's all just
12 statements from an attorney. We have zero evidence that it's
13 had any impact on him. And in fact, at his deposition I asked
14 if there's any reason he couldn't testify and he gave none. So
15 I don't think that that should be a consideration here when
16 it's just simply not in the record. Charlie Ferrara
17 communicates almost daily if not multiple times a day with his
18 father and he -- and, in fact, we show that he's also
19 communicated with Sang Lee right around the time of service.
20 And so it's simply not credible to believe that they didn't
21 know about this lawsuit and the allegations until they retained
22 attorneys and were served with the complaint. That's -- it's
23 just not credible. There's no -- if they wanted to, they could
24 have filed declarations in support of their opposition saying
25 when they became aware of the lawsuit and what they understood

1 it to me. But they didn't do that and so that evidence is not
2 before this Court.

3 **THE COURT:** Okay. So I think the -- you can probably
4 tell the issue that I am trying to resolve is I do think that
5 there is enough in the record to show that the -- Mr. Ferrara,
6 Frank Ferrara, certainly knew before August and so perhaps it's
7 as early as the March -- around March 30th. But then what the
8 legal consequences of that are with respect to a duty to
9 preserve. So, Ms. Lutz, do you -- excuse me, Ms. Hurley, do
10 you have anything else to say on that score before we probably
11 just move on to the next topic I think that we need to address?

12 **MS. HURLEY:** Yes, I do, your Honor. In terms of the
13 advisory committee note that's been referred to, it cautions
14 against the very thing that counsel is asking this Court to do,
15 which is presuming that somebody fully understands the scope of
16 a preservation obligation before a lawsuit is actually served
17 and filed. In fact, plenty of lawsuits get filed and are never
18 served, parties are dismissed before they're served. So even
19 assuming a party knew about something that may have been
20 relevant to the action, before that party is served and asked
21 to appear and defend himself in a lawsuit, there can be no
22 understanding or duty to preserve evidence. And that's -- we
23 cite that at page 16 of our opposing brief where the advisory
24 committee note cautions it's important not to be blinded to
25 this reality, that the scope of information that should be

1 preserved may remain uncertain by hindsight arising from
2 familiarity with an action as it is actually filed. And here,
3 while communications are referenced, whether or not laypeople
4 who communicate on cellphones that overwrite information on a
5 regular basis have any reason to understand or believe that
6 waiting to preserve those cellphones and extract them at a
7 later date for Frank or for Charlie to make a mirror image of
8 his cellphone before he trades it in because he needs to get a
9 new one, to say that that imposes upon either one of them a
10 duty to preserve I think is just not what the rules contemplate
11 in terms of what somebody should be doing with a preservation
12 obligation when they may realize that they're a party to a
13 lawsuit but before they have appeared in the lawsuit or been
14 served.

15 And with regards to Frank, I would just back up --
16 and, again, I keep emphasizing this, but Plaintiffs have an
17 evidentiary burden on this motion, and that burden is to prove
18 by a preponderance of the evidence that certain things
19 happened. There is a citation to testimony of Frank Ferrara at
20 Exhibit 3 to the declaration submitted in support of the reply
21 to Plaintiffs' motion. And Frank Ferrara actually does not
22 confirm that he spoke with the reporter before the date that
23 article was published in April of 2016, I believe. In fact, he
24 says, "I guess." He speculates. It's not confirmed that he
25 has any specific recollection of when he spoke to that

1 reporter. He's getting deposed more than a year later.
2 Counsel did not ask follow-up questions to try to clarify
3 whether or not he had an actual recollection of when the
4 conversation occurred, so there's nothing that Plaintiffs have
5 submitted to support their burden of proving that Frank did
6 know about it before he was served.

7 **MS. WOLFF:** Your Honor, may I respond?

8 **THE COURT:** You know, if you could just -- let me --
9 I did -- I was looking, Ms. Hurley, at -- though at the
10 excerpts of Mr. Ferrara's deposition transcript.

11 **MS. HURLEY:** Yes.

12 **THE COURT:** I apologize, I tend to use -- I look at
13 this online and so it's easier to navigate toward the -- but my
14 recollection, I guess what I was focused on was the
15 acknowledgement by Mr. Ferrara that he had spoken to Mr. Lee
16 shortly after the service that I -- of the lawsuit and he
17 discussed the lawsuit. He says, "I can't remember much." But
18 he acknowledges speaking to Mr. Lee. And so I feel like my
19 impression of that is to the extent we're trying -- I just -- I
20 think given that, it's clear that Mr. Ferrara knows pretty
21 early on and so I don't think it's worth trying to argue around
22 that. Again, I think it really comes down to what his
23 obligations, when those attach with respect to preserving. And
24 I guess one thought comes to mind about the preponderance. And
25 I looked at the committee notes. What if you have -- and I'm

1 not necessarily saying that this is a fact pattern that comes
2 off of what I've seen, but what if you have somebody who is --
3 sometimes you can think of it as like a willful blindness,
4 right, so someone who knows about the lawsuit pretty early
5 after it's filed? You have a UPS delivery, proof of service,
6 you know, maybe he didn't get it. You then look at the records
7 and you see around the time you would expect the notice of
8 initial scheduling conference to have been received by
9 Mr. Frank Ferrara, you then have a text message between him and
10 a codefendant. You then have -- and you -- the same UPS
11 delivery to Charlie Ferrara. You have a couple of weeks later
12 Mr. Ferrara, you know, dumps a phone. I'm not -- that's -- I'm
13 just saying you could have, right, that narrative. You have
14 difficulty in effecting service, which the Plaintiffs have
15 described as dodging. So in other words, at what point can a
16 court say -- find this is willful attempt to postpone or to
17 avoid being served, to avoid having the attachments of all of
18 these preservations, duties? So -- because I don't think that
19 someone should be able to do an end-runaround what the rules
20 require by trying to avoid and say, I didn't know about the
21 lawsuit or I didn't really know the full extent of it, it's a
22 total coincidence that I happened to change my phone a couple
23 of weeks or a week or so before I retain an attorney.

24 **MS. HURLEY:** If I could address that, your Honor?

25 **THE COURT:** Yes.

1 **MS. HURLEY:** And I do want to be careful here to
2 distinguish between Charlie Ferrara and Frank Ferrara. They
3 are two separate and distinct individuals who have different
4 experiences and have had different communications with people
5 who are involved in this case. The facts as agreed in the
6 joint statement that we submitted, Docket Number 459, with
7 Plaintiff are that the missing information from Charlie Ferrara
8 is the cellphone that he disposed of before he appeared in this
9 lawsuit. Looking at the log of text messages that Plaintiffs
10 submitted as demonstrating when these people communicated, it
11 was -- the last communication identified between Charlie
12 Ferrara and Sang Lee would have been before that UPS was ever
13 sent, and that's at page 17 of the Docket Number 470 where
14 Plaintiff makes a list of communications between the various
15 parties. Charlie Ferrara and Sang Lee speak on 7/20/16 and I -
16 - my recollection is the UPS goes out 7/29/16. And there's
17 also no evidence -- and, again, counsel for Plaintiff is
18 presuming and assuming throughout the entire brief somehow
19 Charlie Ferrara became aware of the lawsuit by virtue of Frank
20 Ferrara being aware of it. And even assuming that Frank
21 Ferrara was aware of it and aware of his obligations before the
22 date that he appeared in this case, to assume that that
23 information was transmitted to Charlie Ferrara in any
24 meaningful way that would alert him to a preservation
25 obligation is not proven and not demonstrated. So again I want

1 to make sure that we're clear that Charlie Ferrara is a
2 separate entity. And there's no evidence submitted in the
3 record that he personally was aware of anything or had a
4 communication with other defendants in this case after he was
5 allegedly served or after the date that the service went out,
6 even though that hasn't been demonstrated that it was
7 delivered. So I believe looking at Charlie, there's virtually
8 no evidence whatsoever he had knowledge of this lawsuit before
9 the date that he appeared.

10 **THE COURT:** And with respect to Mr. Frank Ferrara?

11 **MS. HURLEY:** With respect to Frank Ferrara, again I
12 disagree that this establishes as any kind of fact that's
13 capable of supporting the relief requested that he had
14 knowledge. And, again, Plaintiffs record is filled with
15 communications between and among the other Defendants talking
16 about the subject matter, arguably the subject matter of this
17 case. However, there is literally nothing that connects
18 Charlie and Frank Ferrara to this case, with the exception of
19 six text messages that were lost when Charlie deleted his
20 phone. That is the only data on his phone relevant to this
21 case, as agreed in Docket Number 459, the joint statement.
22 There were six text messages. And if you look at the other
23 Defendants, they exchanged hundreds of text messages with each
24 other in a single day's or day or two's time.

25 And with regard to Frank Ferrara, there were nine

1 total text messages that were deleted. The cellphone billing
2 records are a separate issue, but since we're talking about
3 preservation duties and the cellular data, I do want to focus
4 on that. So to say that in those six text messages we know for
5 sure that he was trying to do something to avoid any liability
6 in this case when no other fact connects him to this lawsuit is
7 just such a stretch. And the relief requested is so
8 unbelievably harsh and detrimental to his defense, to impose
9 that obligation upon Charlie Ferrara before he appears in this
10 action I think is not justified by the circumstances or the
11 evidence before the Court.

12 **THE COURT:** But do you -- I guess my question maybe
13 to refine it better is if -- and I -- you don't -- I'm not
14 saying that this is the case here. But if the record spoke to
15 evidence of an individual trying to avoid service, trying to
16 postpone to the last possible date, and actions occurred or
17 were undertaken in that period before you can definitively say
18 the duty to preserve attaches, are you saying that the Court
19 can't make inferences from that record?

20 **MS. HURLEY:** I'm saying that the -- in a situation
21 such as you described, perhaps they can. But here there is
22 actually not evidence of "dodging of service." There's only a
23 statement on information and belief by an attorney who got that
24 information from another attorney; and rather than correcting
25 that by filing in a reply declaration some actual factual

1 support for the dodging issue, it's just overlooked and not
2 discussed, at least not with any evidence. So in that
3 situation, perhaps. But when you have a situation such as here
4 where there's no evidence of dodging, there's no evidence of
5 knowledge of the lawsuit by Charlie Ferrara, this should not be
6 something decided before the trier of fact gets to look at that
7 and make a determination whether these text messages could
8 possibly have contained something harmful. And certainly, if
9 Plaintiffs lose their entire motion today, they don't not get
10 to make this argument to the trier of fact at the time of
11 trial. It's an issue that can be decided like any other that's
12 a disputed issue in this case.

13 And, again, the relief requested is so harsh on the
14 Defendants, whereas the Plaintiffs simply have to put on the
15 same evidence they've already arguably put on here; although,
16 again, I believe it's lacking in terms of showing any bad faith
17 conduct or intent. But the trier of facts should have this
18 question. It should not be decided in a hearing where we have
19 not been able to put on evidence with the testimony of the
20 parties who are party to these communications. So I think
21 under the circumstances, my answer is it should not be issued.

22 **THE COURT:** Let me ask you this. What am I to make
23 of the fact that the Ferraras -- oh, excuse me, Mr. Frank
24 Ferrara and Charlie Ferrara, and for that matter as well
25 Mr. Lee, did not submit a declaration to state -- to almost put

1 to rest when they did know when they were informed?

2 **MS. LUTZ:** Your Honor, maybe I can be heard on behalf
3 of --

4 **THE COURT:** Oh, yeah, either one of you, yes, please.

5 **MS. LUTZ:** -- Mr. Lee. I -- for me at least, you
6 know, this motion has been combined with other Defendants in
7 this case and it's a little confusing as to what is being
8 articulated against some Defendants versus others. I know
9 Plaintiffs have referenced these newspaper reports and
10 obviously the conversation with Frank Ferrara and Mr. Lee.
11 However, what we don't know about the conversation with
12 Mr. Ferrara and Mr. Lee is the substance of it. Really it's
13 just that they may have discussed the lawsuit. Mr. Ferrara may
14 have said, I may be involved. Mr. Lee may have not even known
15 at that point whether -- what extent his involvement was in the
16 lawsuit.

17 **THE COURT:** You know what, let me just -- I guess --
18 but that's the --

19 **MS. LUTZ:** Right, so --

20 **THE COURT:** -- well, first, that's the point, right?
21 I mean that they, the Plaintiffs, are deprived. And I
22 certainly -- I mean, I think that there is -- how -- if this is
23 resolved in such a way that the Plaintiffs get to put all of
24 this in front of the jury, I think that there is a lot for them
25 to mine out of this record because you have, for example, the

1 June 26 -- the proof of service that says on June 26th via UPS,
2 we sent the -- a notice of initial scheduling order out to
3 Mr. Charlie Ferrara and Mr. Frank Ferrara. And from my
4 recollection, there is a text message between Mr. Frank Ferrara
5 and Mr. Lee on July 29th, right? And to say that we don't
6 think -- we have no indication that they would have been
7 discussing this, I think that's -- you know, I think that
8 that's a -- there's a lot for the Plaintiffs to argue there.
9 And maybe it's possible that they weren't talking about the
10 lawsuit. It seems so coincidental, right, that we have this
11 un rebutted proof of service July 26th. A few days later it
12 should have arrived. And then we see Mr. Frank Ferrara texting
13 or having these texts with Mr. Lee and they're not available,
14 they're not recoverable. I don't find -- I did not find
15 persuasive the arguments that somehow there is diminished
16 relevancy to these text messages because they are not -- they
17 did not occur during the time period alleged in the complaint.
18 I think that they can be highly probative, not just relevant
19 but probative of many things. And the Plaintiffs' complaint is
20 that because they're no longer recoverable, they're deprived of
21 all of that information. It doesn't necessarily have to be
22 harmful, but it could be relevant, highly relevant so --

23 **MS. LUTZ:** I'm just a little confused I guess what
24 we're talking about. I thought the issue was whether when the
25 duty preserved. I think when we get to the issue of relevance

1 and possible prejudice against the Plaintiffs, that's assuming
2 that Rule 37(e) even applies, that's assuming that none of the
3 Defendants and that Mr. Lee didn't take any reasonable steps to
4 preserve. So I think that's kind of jumping the gun as far as
5 the analysis so far. As far as the duty to preserve, Defendant
6 is not arguing that there was a duty some point between June
7 21st when he was served and when the litigation hold letter
8 came through on July 4th. So anything in July is something
9 that I think is up for discussion that I'm happy to discuss.
10 But as far as the duty to preserve to Mr. Lee, it certainly
11 does not apply any point before June 21st.

12 **THE COURT:** Okay, all right, so maybe that -- I mean,
13 I guess certainly for Ms. Hurley I think that -- you know, I
14 think it's not a good fact pattern when I look at the record or
15 the timeline. So -- and I guess I'm trying to again with as
16 much precision and support either from the facts or the case
17 law of when you can attribute the duty to preserve to at least
18 Mr. Frank Ferrara so --

19 **MS. HURLEY:** Again, your Honor, our position is
20 simply that to look at this in the light least favorable to
21 both of the Ferrara Defendants is a little unfair given the
22 circumstances. Putting a presumption that they were talking
23 with Sang Lee about anything other than the items they
24 testified they talked about Sang Lee about, which were looking
25 for a job, buying a car, which were -- these topics were all

1 explored in the deposition of at least Charlie Ferrara, what he
2 spoke with -- he -- with Sang Lee about. There were not
3 that --

4 **THE COURT:** Let me interrupt you on that, though,
5 because I -- right, I think Mr. Sang Lee's deposition testimony
6 is now -- there are demonstrated at least faulty recollections
7 I think, right, in light of later productions. He made a
8 statement that I never had these communications regarding the
9 complaint. And then we see other text messages, well, oh, yes,
10 I think there was. I'm not saying that that's anything at all
11 sinister. Recollections can be imperfect. But I guess I don't
12 -- I feel like they're -- Ms. Wolff can point to other evidence
13 in the record that will demonstrate that the recollections
14 perhaps aren't what they stated in the deposition. I mean, is
15 that fair, Ms. Wolff?

16 **MS. WOLFF:** Yes, your Honor, and especially with
17 respect to Sang Lee. Like as you mentioned, he said there were
18 no communications with codefendants about the subjects of this
19 case, and low and behold last week we get a late production
20 from Defendant Papayans where Sang Lee is communicating with
21 codefendants in this case the date one of our Plaintiffs was
22 attacked, specifically about that attack. "Oh, there's kooks
23 in the water." One text describes his physical description of
24 our Plaintiff, "Let's go get him." That seems to be a direct
25 lie in his deposition.

1 Similarly with Charlie Ferrara, at his deposition he
2 said he -- first he said he didn't communicate with any other
3 codefendant. Then when I drilled down on that, he said, oh,
4 yeah, I did communicate with Sang Lee, only about work, and
5 that would have been in 2008, oh, and 2014. No mention of the
6 slew of texts that had occurred last year.

7 That seems to be a pattern with the Ferraras of
8 trying to hide relevant evidence. If you'll recall, they
9 responded to the discovery requests initially completely
10 disclaiming that any text messages existed with any Defendants.
11 And the only reason we knew that was not true was because we
12 were provided with a privilege log by Sang Lee that -- later
13 that month that showed that there were in fact communications.
14 And then as you recall, it was a seven or eight-month process
15 of meeting and conferring while the Ferraras dragged their feet
16 and refused to produce any evidence, all the while saying that
17 they would be producing something or were working on it. In
18 the meantime, during that time period, evidence is being
19 destroyed. There's an 18-month retention policy that cellphone
20 providers abide by. And had they taken steps any time along
21 that way to reach out and simply download their cellphone bills
22 from the carrier's website, that evidence wouldn't have been
23 destroyed. And now Charlie Ferrara, we're missing first of all
24 an entire cellphone. But in addition, we can't even look at
25 his cellphone records to see what texts he sent or received

1 during that critical January, February timeframe because his
2 cellphone bills mysteriously don't have that text information.
3 There are bills during that timeframe but they've omitted the
4 text information, whereas all the other bills have that
5 information. So we're deprived of that as well. So Ms. Hurley
6 said that there are only six text messages that are in dispute
7 with respect to Charlie Ferrara. Six that we know of, but we
8 don't have his records. The only reason we know of those six
9 is because we were able to look at other people's records and
10 prove that.

11 And I would just go back a moment and say that the
12 rule described by counsel here where somebody isn't required to
13 preserve until they're served and then talk to their attorney,
14 not only is that not the rule, but that aside, it would reward
15 evasion of service and spoliation. And, you know, the Federal
16 rules are all about fairness, and that is simply an entirely
17 unfair result.

18 And one thing that I did want to address with respect
19 to Charlie's knowledge, somehow he knew to retain the same
20 attorney as his father. There were also six communications
21 involving Charlie Ferrara right around the time that the
22 lawsuit was filed, the date -- after the lawsuit was filed with
23 codefendants. That's not including communications with his
24 father and uncle whom he regularly communicated with. It's not
25 credible to believe that his father is named in a lawsuit, his

1 uncle's named in a lawsuit, and they are aware of it and
2 neither one of them tell him that he's also named. That's just
3 not credible.

4 I would also say that something that both counsel
5 have sort of thrown about a little bit earlier is where they
6 said that there's no evidence that these text messages were
7 deleted, that's not true. There is ample evidence the texts
8 have been deleted. Cellphones don't just delete information.
9 You have to, the user has to, delete that information. The
10 cellphone then overwrites that. The user doesn't necessarily
11 control that process of when it's overwritten, although there
12 are certain things a user could do to speed it up. But the
13 deletion itself is entirely under the user's control. There's
14 no evidence to suggest that either -- any of these Defendants'
15 cellphones just deleted information without their doing. The
16 overwriting process does vary depending on how much data is
17 available on the phone, but data that hasn't been marked for
18 deletion isn't just deleted when the phone runs out of room.
19 That's not what happens.

20 **MS. LUTZ:** Your Honor, can I be heard on a point I
21 think that was brought back a while ago in regards to the text
22 messages that were produced from Mr. Papayans? And in regards
23 to those text messages, none of those -- if you look at
24 Mr. Lee's extraction report and if you look at his T-Mobile
25 cellphone records, none of those are in either of his records

1 which would indicate he never received any of these text
2 messages. These text messages may have gone out from
3 Mr. Papayans's cellphone, but they were never received by
4 Mr. Lee.

5 **MS. WOLFF:** Your Honor, it's interesting though that
6 Mr. Lee then called Mr. Blakeman 62 times within that same
7 hour. I would also add that the only reason we have those text
8 messages from Mr. Papayans is because the police obtained a
9 warrant for his cellphone and it was in the custody of the LAPD
10 before we filed this lawsuit. That's the only reason we have
11 those messages. All other recipients to those messages did not
12 produce them in discovery, leading us to believe they've been
13 deleted or withheld. Either way, it's a violation of the
14 rules. Were it not for the fact that the LAPD obtained his
15 phone, we likely wouldn't have those messages. He's also
16 clearly listed as a recipient.

17 **MS. HURLEY:** And, your Honor, if I may be heard on
18 some of the issues that Ms. Wolff brought up? With regard to
19 making any assumption of some anything out of the fact that
20 Frank Ferrara and Charlie Ferrara have the same attorney, I can
21 represent it's because they are being defended under the same
22 insurance policy. It has no significance or any nefarious
23 information whatsoever comes out of that.

24 And, again, with regard to any evidence in the record
25 that --

1 **THE COURT:** Let me just stop you there though. You
2 know, it kind of -- the point though I think that she's making
3 is you have Mr. Ferrara, Charlie Ferrara's father, his uncle,
4 his cousin, named in this lawsuit in a small town. I mean,
5 doesn't it strain credulity to think that somehow he's not
6 aware of the lawsuit?

7 **MS. HURLEY:** As far as I think in Charlie's case it
8 could. There's no evidence that he was aware that this was an
9 actual -- any event that had any preservation obligation set
10 upon him. There's no evidence that he was provided a copy of
11 it, that he was interviewed, that any other Defendant told him
12 about it. It's all speculation and conjecture, and that is not
13 evidence capable of supporting anything in a lawsuit. It's
14 something that should be disregarded as inadmissible. So
15 there's -- to speculate that the totality of the circumstances
16 lead to a conclusion that Charlie knew, that's what the jury
17 should do is hear the --

18 **THE COURT:** Right.

19 **MS. HURLEY:** -- admissible evidence and make that
20 determination.

21 **THE COURT:** Well, but what about the fact though that
22 the -- it's difficult I think because the proof of that either
23 way, right, to show that he didn't or -- know or proof that
24 Ms. Wolff is looking for could have been found on the
25 cellphones. And we don't -- these text messages which -- and,

1 again, I guess is it just a coincidence --

2 **MS. HURLEY:** Well, your Honor, I --

3 **THE COURT:** -- that some of the dates line up in a
4 way that where you can see certain things happening: the
5 filing of the lawsuit, what we would reasonably expect, the
6 notice of initial scheduling conference to have arrived on
7 Frank and Charlie's -- their respective addresses --

8 **MS. HURLEY:** Well, your Honor, I would just point out
9 that if you're going to be giving the benefit of the doubt to
10 Plaintiffs' theory of the case, there should be some
11 consideration of possibly those text messages could have helped
12 Charlie. In fact, both -- in both of Frank and Charlie's
13 cases, we point out that they have looked anywhere they could
14 possibly be stored to try to recover them because they are
15 competent in the knowledge that it will not confirm that they
16 had anything to do with this lawsuit. It will exonerate them
17 because there's nothing tying Charlie Ferrara and Frank Ferrara
18 to this lawsuit, other than a few communications they had with
19 Sang Lee that are deleted. And that is speculative whether
20 those communications contained anything. And so giving the
21 Ferraras the benefit of the doubt and putting -- again, let's
22 put it in the light most favorable to the Ferraras, they know
23 they didn't do anything wrong, they know that -- let's assume
24 they knew that one of the other Defendants had either actually
25 assaulted or hit one of the Plaintiffs. They knew they didn't

1 participate in that. They may have heard of it at some point
2 but they had nothing to do with it. They found out after the
3 fact. Why would they have any reason to believe --

4 **THE COURT:** Yeah, let me just interrupt you there. I
5 think though that then we get into something, another part of
6 the discovery process which I think is not again a great record
7 for the Ferraras, which is the initial responses, right? I
8 think you need to have a really kind of a sterling record on
9 that to show we got these discovery responses propounded in
10 November and then just the blanket assertion there's nothing
11 there --

12 **MS. HURLEY:** And if I could address --

13 **THE COURT:** -- and all the while this information is
14 evaporating because of --

15 **MS. HURLEY:** Well, --

16 **THE COURT:** -- the retention policy. And even if
17 it's not, I mean, it still -- it just demonstrates perhaps, I
18 mean, most -- that there's not a real concern with complying
19 with the rules, responding to the Plaintiffs' discovery
20 requests, comprehensively --

21 **MS. HURLEY:** If I could --

22 **THE COURT:** -- supplementing --

23 **MS. HURLEY:** If I could address that, your Honor?

24 **THE COURT:** Yes, please.

25 **MS. HURLEY:** Of course I have acknowledged in the

1 most recent filing that there were issues. And I will
2 represent to your Honor that I became involved in this case on
3 a very day-to-day basis around the time that the original
4 sanctions motion was filed. And we came to an agreement with
5 Plaintiff resolving that sanctions motion for the prior issues
6 that happened in discovery. Since I've become a day-to-day
7 handler of this case, we have turned it around, and when
8 Plaintiffs have said jump, I've said how high and given them
9 every piece of information they've asked for as quickly as
10 possible, with the exception of attorney-client privileged
11 communications that are, number one, neither responsive to the
12 questions that have been asked in discovery, or relevant to any
13 of the aspects of the case and are privileged and protected
14 also. Setting that aside because I understand there's still a
15 dispute as to that, we have given them everything. And I -- if
16 there is going to be an allegation that, oh, the timing
17 affected the recoverability of certain information, I want to
18 make sure that we're specific as to what that could have
19 affected. It could not have affected Charlie Ferrara's
20 cellphone because he disposed of his cellphone three months
21 before the discovery requests were propounded so --

22 **THE COURT:** Let me ask you that. Where is the
23 cellphone?

24 **MS. HURLEY:** He traded it in to get another
25 cellphone.

1 **THE COURT:** And there's --

2 **MS. HURLEY:** He's not a person with a lot of money,
3 so when he goes to get a new cellphone, he gets a credit for
4 trading in his old cellphone. And he provided it to the old
5 provider, which I believe he testified to in his deposition.
6 And he couldn't remember the exact date that that happened but
7 he traded it in and got a totally new phone. So he had a
8 belief that the information was transferred. It turned out it
9 was not. Our recovery efforts have shown that didn't happen.

10 But in terms of just timing, Charlie Ferrara's
11 cellular data from the time period relevant to Plaintiffs'
12 discovery requests would not have been affected by any issues
13 with responding to discovery on time or accurately.

14 With regard to Frank Ferrara's cellular phone data,
15 again, there's no evidence that any of these text messages were
16 intentionally deleted. There's evidence that they are off the
17 phone and not recoverable, but we know they had existed. And
18 the experts seemed to be in agreement that there's no wiping
19 software, so there wasn't some effort to dispose of all of the
20 messages on Frank's phone. So to say that that evidence was
21 not preserved because of a timing issue I think is again
22 speculation at best. Frank Ferrara -- and now --

23 **THE COURT:** What about the text messages --

24 **MS. HURLEY:** Okay, yes, --

25 **THE COURT:** -- that -- there's that two-month period

1 where the records don't --

2 **MS. HURLEY:** Yes, your Honor, I will -- I'm certain
3 that was my next thing I was going to address. But first I did
4 want to point out, Frank Ferrara has produced complete cellular
5 phone billing records, so none of his cellular phone billing
6 records are missing. The only things Plaintiffs do not have
7 are the redacted attorney-client communications between Frank
8 Ferrara and attorneys that formerly worked at Bremer, Whyte,
9 Brown, and O'Meara. That is it. And, again, I've brought that
10 for in-camera review to prove that is the case.

11 With regard to Charlie's cellular phone billing
12 records, it is true that there are two months of cellphone
13 billing records that have not been recovered yet from Sprint.
14 I attached to my declaration multiple, multiple requests that
15 I've made and followed up with Sprint. And I am trying to get
16 those. My understanding is they're in processing. I will
17 either find out that they exist or don't exist before trial in
18 this case. And if we don't, again, it's an issue that
19 Plaintiff can argue. But when I realized the issue that was
20 happening in this case, I immediately took action and attempted
21 to recover those. But to an important point is while those
22 would show that communications occurred, they would never
23 include the substance of text message communications. They
24 would only show that there was a text message communication.
25 So they're not going to be something capable of establishing a

1 conspiracy existed on their face. They would have to be looked
2 at in connection with communications to other people and other
3 parties in this case.

4 And as counsel for Plaintiff pointed out, there have
5 been -- and just to defend the Ferraras for a moment, we have
6 made a complete production of everything we've been able to
7 recover as of no later than September 21st. As counsel for
8 Plaintiffs represented, things have been trickling in from the
9 other Defendants over -- as recently as this week. So the
10 Ferraras are -- now have gone above and beyond to try to fix
11 the issues that were caused by the early responses, and we are
12 in compliance with our discovery. And my understanding and
13 belief is that I will have the Sprint records that would just
14 show text detail to show who Charlie was having text messages
15 with around that time period, but not the substance. And when
16 we compare it to the other records of the other parties, which
17 again is something that we've been working on, but as the
18 records haven't been coming in as quickly as hoped, I haven't
19 been able to completely do that, it's something that can be put
20 together and identified so that the trier of fact will know and
21 have the information it needs to decide if it believes that
22 Charlie had texts with people or not during that time period.

23 **THE COURT:** Well, then let me ask you this, though.
24 To put it in -- that in context, the procedural posture of the
25 case as Ms. Wolff argued, the issues that arose with respect to

1 discovery and complying with the Court's order occur at the
2 same time that a motion is being filed by the Ferraras saying
3 unequivocally a complete dearth of evidence. And then
4 Ms. Wolff has to respond to that. And then by your own
5 acknowledgement, which I appreciate, there is this rolling
6 production continues and we're still waiting for information
7 that was requested in November of 2016.

8 **MS. HURLEY:** Just the --

9 **THE COURT:** I mean --

10 **MS. HURLEY:** -- Sprint details, correct.

11 **THE COURT:** Right. But, you know, maybe this case is
12 just all coincidence with respect to dates but, again, it's
13 that period of January, February that's described in the
14 complaint so -- which I think you'd be hard-pressed to
15 reasonably assert is not something that the Plaintiffs would be
16 very interested in.

17 **MS. HURLEY:** Well, perhaps, your Honor, the one item
18 of relief requested by Plaintiffs may be reasonable given that
19 fact, that the motion for summary judgment not be granted. But
20 as to the other two, I do not believe that there's enough
21 evidence to show that there is the necessary wrongdoing to
22 establish as a proven fact that Frank Ferrara and Charlie
23 Ferrara conspired with anyone in this case to do anything.
24 That request for a factual finding is so far beyond the pale
25 when you look at it in comparison to the evidence against

1 Charlie and Frank Ferrara which is literally nonexistent. So
2 there's an assumption that among the tens of thousands of text
3 messages that have been exchanged in this case, 15 total, six
4 with Charlie and nine with Frank, are going to establish that
5 they were actually participating in a conspiracy is such a
6 stretch that the Ferraras should be entitled to at least defend
7 themselves and defend that they did not intentionally delete
8 those text messages to avoid liability, be questioned on cross
9 examination, and let the Plaintiffs ask them all about that.
10 But to establish it now is simply not a result that would be
11 justified under the circumstances, especially given what 37(e)
12 requires in terms of a finding that an evidentiary sanction is
13 appropriate. And here it's not just an evidentiary sanction,
14 it's literally a finding of a cause of action for conspiracy to
15 do all of the bad acts of the other Defendants in this case,
16 which is very difficult for the Court to even consider at this
17 point in time because I don't believe Sang Lee is directly
18 accused of doing anything to any of the Plaintiffs, so there
19 would have to be a finding that Sang Lee is conspiring with the
20 other Defendants for Charlie and Ferrara -- Charlie and Frank
21 to even be considered conspiring with a person, conspiring with
22 the Defendants who are actually accused of doing the acts.

23 **THE COURT:** Let me ask you this. Going back then, I
24 don't want to address that issue just yet --

25 **MS. HURLEY:** Okay.

1 **THE COURT:** -- with respect to the adverse inference.
2 But with respect to the pending motion that your clients have
3 filed, or you filed on behalf of your clients, has there been
4 any consideration to simply withdrawing it? I mean, I don't --
5 obviously you have a responsibility to be a zealous advocate,
6 but I just wonder about these statements which are strong about
7 the complete dearth of evidence. It seems to me that -- almost
8 as a responsibility as candor to the Court you would say, you
9 know, but see this footnote about this ongoing and perhaps
10 regrettable approach to discovery, and the fact and
11 acknowledgement that while we're saying that there's a dearth
12 of evidence, we are still attempting to obtain evidence that
13 they've requested almost a year ago.

14 **MS. HURLEY:** And, your Honor, at the time that that
15 motion was filed, again, I myself did not fully understand the
16 scope of the issue that was going on in discovery. I have
17 since clearly gotten familiarized with that and understand it
18 now. I'm happy to consider either an errata to the original
19 motion or perhaps even withdrawing it. Again, I think to the
20 extent we cannot get those Sprint billing records before the
21 opposition is due for Plaintiffs, I certainly would consider
22 doing a withdrawal. However, I do still think that there is an
23 open and disputable issue as to whether the text messages that
24 were not recoverable because Charlie disposed of his phone and
25 Frank doesn't have them because they were overwritten shows

1 that there could have possibly been evidence, because there's
2 no -- again, it's this circular logic argument that because
3 they're deleted, they must be relevant, and they're relevant
4 because they're deleted. And I understand how the facts might
5 suggest that the Ferraras could have a disputed fact on that
6 issue. However, I'm certainly open to considering other
7 options with the motion for summary judgment. But when we look
8 at the other relief requested, I think it's extraordinarily
9 harsh and it's unsupportable with the law cited in support of
10 Plaintiffs' motion.

11 **THE COURT:** Okay, I guess I didn't want -- I'm not
12 trying to put you on the spot about the summary judgment
13 motion, but I do think that the Plaintiffs very reasonably can
14 be heard to complain that they are now responding to the motion
15 and also bringing sanctions -- or, excuse me, moving for
16 sanctions because of what's occurred in discovery and that it's
17 the persistence in the motion, again, relying on the dearth of
18 evidence. So I -- again, I don't -- I guess I'm not trying to
19 get you to concede anything or -- you know, I recognize that
20 that would be something that you would have to consult with
21 your colleagues and your clients. But I think it does add
22 color to the sanctions motion. So I just wanted to hear your
23 thoughts on that.

24 **MS. WOLFF:** Your Honor, may I address some of the
25 points raised by counsel?

1 **THE COURT:** Yes.

2 **MS. WOLFF:** Thank you. And I apologize that they
3 might not be completely fluid because there are several
4 different issues that were raised. The first though is that I
5 believe Ms. Hurley said that some of the evidence could even
6 exonerate or be favorable to her clients. The case law says
7 that's irrelevant, it doesn't matter who the deleted evidence
8 could favor. What matters is that it's relevant. And so the
9 fact that it could have favored her clients, it doesn't matter,
10 it's gone. We don't know what it was. And there was an
11 obligation to preserve it, and that's spoliation.

12 And her clients -- her statements in the brief that
13 her clients would like nothing more than to have this evidence
14 to produce, first of all, there's no declarations from her
15 clients saying that. And, in fact, we have statements from her
16 client, from Charlie Ferrara, under oath at his deposition that
17 he hasn't really tried very hard to get this information.

18 Also, to the extent that the Plaintiffs reached an
19 agreement with Charlie and Frank Ferrara on the motion for
20 monetary sanctions, that agreement was only related to the
21 amount of the sanctions, not to the issue of whether or not
22 information was destroyed, none of that. That's what this
23 hearing is about.

24 It also can't be that the Defendants get a free pass
25 when they switch attorneys within the same firm and that, you

1 know, the prior attorneys messed up discovery but we're on it
2 now. It doesn't matter. It's the same party, it's the same
3 firm. Not to mention that the Plaintiffs reached out to
4 Ms. Hurley in April about these issues; and by July, her
5 clients' cellphones still had not been imaged or preserved.
6 There was -- and there was no attempt to get the information.
7 In early July, I spoke with an associate in her office,
8 Ms. Bacon, who said we will -- they'll look into getting their
9 bills online. They still hadn't done that.

10 Also, and this is sort of out of place here but I
11 think it bears nothing, that Charlie Ferrara said at his
12 deposition that the data was transferred over from his old
13 phone to his new phone. That's sort of glossed over here. But
14 there -- something should be said for the fact that he
15 testified under oath specifically that text messages and
16 photographs were able to be transferred from his old phone to
17 his new phone. When he brought up the issue that he had gotten
18 the new phone, he said sometime April or maybe summer of 2016,
19 he said when he got a new phone, he was able to transfer that
20 data over. That was something that I was concerned about but
21 he said that it was fine, the data was transferred over.

22 I'd also add that belated compliance is insufficient
23 here. And courts have said that belated compliance doesn't
24 excuse discovery violations. The fact that Sprint could
25 potentially get these records, at this point we'd like to have

1 those records. But we're facing trial in two months, and the
2 fact that we're still getting evidence still trickling in is
3 incredibly prejudicial. Mr. Franklin and I should be in our
4 offices preparing for trial right now, not preparing for a
5 sanctions motion. We only have 12 hours to put on our case,
6 and so we shouldn't have to waste some of that time talking
7 about evidence issues with the jury, evidence preservation
8 obligations, destruction of evidence. We should be able to
9 talk about the causes of action on our complaint.

10 And to Ms. Hurley's statement that the cellphone
11 records with the -- that show that -- when text messages were
12 sent or received that were missing from Charlie Ferrara during
13 that critical timeframe, she said something about how that
14 couldn't show a conspiracy. I completely disagree. It would
15 certainly show a conspiracy if there's a slew of exchanged
16 messages between and among the coconspirators and the
17 Defendants in this case. And even in the absence of content,
18 that information is highly relevant.

19 And so, your Honor, I can -- I'm happy to go into --
20 further into the prejudice we've suffered, the relevance of
21 these messages, and the Defendants' intent to deprive
22 Plaintiffs of this information, but the fact is that we're --
23 we've been prejudiced so far in having to oppose these summary
24 judgment motions, and we continue to be prejudiced. The -- in
25 fact, you know, the Defendant Papayans's production last week

1 of all these messages, on two of the dates that our clients
2 were harassed and attacked, they're with Defendants in this
3 case including Sang Lee, Papayans, and Brant Blakeman. And so,
4 you know, we will certainly -- we've already begun the meet and
5 confer process, but we will be also bringing additional
6 sanctions motions to the extent that Defendants have -- other
7 Defendants received these text messages and they weren't in any
8 productions.

9 **MS. HURLEY:** And, your Honor, if I may respond?

10 **THE COURT:** Okay, yes.

11 **MS. HURLEY:** Yes, again, Ferraras, to be liable for a
12 conspiracy here, there has to be some evidence that they were
13 part of the operation of the conspiracy. The simple fact that
14 a text message went to a person who is a defendant in this
15 lawsuit is incapable of establishing that without other
16 evidence supporting that the communication itself led to the
17 furtherance of the conspiracy. If the Sprint records are
18 identified and produced, they will literally be potentially 15
19 pages. It's just a couple of months of cellphone billing
20 records. With the software we have available, we can scan and
21 image it and identify the phone numbers of the other Defendants
22 literally in under five minutes. So to say that there's going
23 to be some burden of more than five minutes, if and when we're
24 able to get these Sprint records, for anybody to review them is
25 just not the case. It's -- I want them to be produced. I --

1 following up and I will produce them if I get them. But the
2 burden is going to be very, very small. I'm happy to meet and
3 confer with counsel for Plaintiff regarding the MSJ if those
4 documents are not obtained within a reasonable time before
5 their opposition is due. And I'm happy to do that off the
6 record with Ms. Wolff.

7 But in terms of -- I have not, as your Honor knows,
8 tried to make any excuses for my firm or any prior conduct.
9 What I've tried to do is establish that having corrected the
10 issues that arose in the initial discovery period of this case,
11 earlier than any other Defendant I would say at this point in
12 time since there are still outstanding motions being met and
13 conferred on for the other Defendants and their failure to
14 comply with discovery, the Ferraras are in the most compliance
15 at this point in time with their discovery obligations. So to
16 dwell on the past actions when we're -- what we're looking at
17 now is what evidence exists and doesn't exist to be presented I
18 think is somewhat of a red herring and misses the point of this
19 motion, which is should the Ferraras be prohibited from
20 defending themselves against a conspiracy claim because they
21 don't have the content of a few text messages and there's not
22 really any evidence that they intentionally deleted them?

23 And, finally, while the Plaintiffs do have a case to
24 put on against multiple defendants, the Ferraras are entitled
25 to defend themselves. And their defenses, we didn't

1 particulate in communications about the conspiracy because
2 there's no allegation either one of them directly assaulted,
3 battered, or prevented either of the Plaintiffs from entering
4 the beach. And this is not a class action case so it's only
5 specific to those two Plaintiffs. And there is no evidence in
6 the record, so the only way the Ferraras are going to be liable
7 is if there is a conspiracy found against them. And to decide
8 as a determined issue of fact to -- at this hearing that there
9 is a conspiracy between the Ferraras and any other Defendant
10 literally gives them nothing to do at trial, they have no
11 defense, they sit there and wait for a verdict against them
12 because they are now basically found liable on the conspiracy
13 theory.

14 **THE COURT:** What about Ms. Wolff's argument which I
15 hadn't focused on, that they -- as you know, that you're
16 allotted a certain amount of time at trial for your case, and
17 it's -- would be unreasonable for her now to have to carve out
18 some of that time to put on I think what you argue is a lesser
19 sanction that and perhaps more reasonable if a sanction's going
20 to be imposed, putting on the evidence about what has
21 transpired in discovery?

22 **MS. HURLEY:** Your Honor, I think that would be the
23 only subject matter of examination for the Ferraras because
24 they literally have done nothing else relevant to this case.
25 So to ask and inquire into those issues on what happened to the

1 text messages, who were you communicating with, well, you
2 deleted them and you explain why they're not there and why we
3 should believe you, I mean, that's literally the only testimony
4 that the Ferraras would have to give because there's not much
5 else that -- there's nothing else that they've been involved
6 in.

7 **MS. LUTZ:** Right, and I completely agree with that as
8 far as Sang Lee. There is no indication that Lee even talked
9 to any of the Plaintiffs so this would be the discussion of the
10 case. This is the only way that either of these parties are
11 involved.

12 **MS. WOLFF:** Your Honor, this is not true, and we can
13 get into the evidence if they'd like. There's testimony from
14 our client, from Corey Spencer, that he spoke with Sang Lee the
15 day he was attacked on January 29th. There's text messages
16 that Sang Lee received on the 29th saying "there's kooks in the
17 water," go get them. And then our Plaintiff puts him there at
18 the scene. Charlie admits to being in the rock patio, rock
19 fort when our client Diana Reed was assaulted and attacked.
20 There's certainly evidence, plenty of evidence, that their
21 clients have been involved in these actions. But if Ms. Hurley
22 is saying that her clients' defense at trial is going to be
23 that they did not participate in the communications regarding
24 the conspiracy, that's a severe prejudice to Plaintiffs when
25 they've destroyed those communications. They would be

1 profiting from their misdeeds.

2 **MS. HURLEY:** Your Honor, I disagree. It's the --
3 it's their defense because there are multiple phone
4 conversations. So setting aside the texts, there are multiple
5 phone conversations that don't have any text because they
6 weren't recorded, they weren't written down. So the parties
7 are going to have to testify to the contents of those phone
8 conversations and what happened in them. So it -- the texts
9 are the same thing, because we don't have the contents of the
10 texts, all it's going to entail is the Ferraras testifying to
11 what they were talking to Sang Lee about on these days;
12 because, again, it's only texts to Sang Lee that we're talking
13 about, and it's only 15 that are -- those are the only items
14 that are going to have to be inquired into. It will take less
15 time than asking any other Defendant about the contents of
16 their phone calls about the conspiracy to address the entirety
17 of the allegations against the Ferraras.

18 And just to clarify, Charlie Ferrara did not admit to
19 being involved in any way in any activity at the rock fort. He
20 happened to be surfing on one of the days that the incident
21 occurred, but there's no evidence he was involved. He was just
22 present at the bay.

23 **THE COURT:** Let me ask you there, let's say that the
24 two-month period where the text message are not available --

25 **MS. HURLEY:** This -- are you talking about the

1 cellular phone billing records?

2 **THE COURT:** Yes.

3 **MS. HURLEY:** Okay, yes.

4 **THE COURT:** And it's -- you know, I think of it more
5 -- it's not just the bills, right, it's the records, right? I
6 just want to be clear, it's not just how much --

7 **MS. HURLEY:** It is just -- your Honor, it is just the
8 bills. It's basically the bill with the call detail and the
9 text detail. So if you get your printout and it says your
10 phone number and it goes through every call by day, and then it
11 lists the phone numbers and it lists every text by day.

12 **THE COURT:** So I guess let me be more precise. It's
13 not that Ms. Wolff wants this to show how much he had to pay or
14 was charged. It's --

15 **MS. HURLEY:** Correct.

16 **THE COURT:** -- the other non-financial component --

17 **MS. HURLEY:** It's who he was --

18 **THE COURT:** -- or billing component.

19 **MS. HURLEY:** -- communicating with, yes, your Honor.

20 **THE COURT:** Right. And so we don't have the two-
21 month period from January and February 2016 right now.
22 Let's --

23 **MS. HURLEY:** Well, it's -- it -- the -- as far as the
24 relevant time period, because the Plaintiffs don't allege any
25 acts of harassment, it's literally about two weeks because the

1 harassment occurred on January 29th, 2016. And, again, because
2 this isn't a class action case, any allegations of assault,
3 battery, or other items being -- harms committed against the
4 Plaintiffs necessarily relates to the two Plaintiffs. So I
5 dispute that the time period before that's relevant, although
6 it was asked for in discovery and I am trying to get it and
7 provide it to Plaintiffs. But looking at the relevant
8 timeframe, which is January 29th, the -- we only don't have
9 records from January 29th, 2016, to February 14th, 2016. So
10 it's about two weeks.

11 **MS. WOLFF:** It -- I believe --

12 **THE COURT:** I guess, you know, I just -- I -- you
13 know, and you obviously are very experienced and you well know
14 how to try your case. But evidence around right -- it's
15 extremely probative. If there's no communication and then all
16 of a sudden you have a spike in communication, that's terrific
17 evidence potentially for argument. And I -- if you're -- if
18 the defense is going to be, and it sounds like among other
19 things -- obviously I'm not trying to pin you down -- but
20 there's, you know, where's the proof, there's no evidence, and
21 then if Ms. Wolff is deprived of pieces of data that they
22 requested and then let's say we never get the January, February
23 text message phone records, then why -- then your -- I mean,
24 Ms. Wolff said your client then can profit from that. And why
25 is that fair? Why shouldn't there be some adjustment --

1 **MS. HURLEY:** Well, your --

2 **THE COURT:** -- because of the evaporation of it
3 because your client didn't comply with discovery, or there was
4 not compliance?

5 **MS. HURLEY:** Well, your Honor, one thing that I would
6 want to point out that I will be doing in preparation for our
7 clients' defense is gathering the cellphone billing records of
8 all of the other Defendants and comparing them to Charlie
9 Ferrara's and Frank Ferrara's phone numbers which will
10 demonstrate during that time period at least that they were
11 communicating with those individuals. Again, because other
12 Defendants' information has sort of been rolling in on a slower
13 basis, that hasn't occurred in full yet, but it certainly can.
14 And that's work that I -- my office will be doing. And
15 honestly I'm happy to share that with anyone because I think
16 that it would be helpful in a settlement negotiation once I
17 compare all of that information to reach out to counsel for
18 Plaintiff and say, okay, look through all of the records of the
19 different Defendants, there are no calls during this time
20 period. And if there are, then counsel for Plaintiff has that
21 evidence. And there's still -- I'm very optimistic that those
22 small amount of cellphone bills will be available before trial.

23 **THE COURT:** Okay. All right, Ms. Wolff, let me ask
24 you now turn to -- so thank you, everybody. I do --

25 **MS. HURLEY:** Thank you, your Honor.

1 **THE COURT:** -- I think this has been very helpful in
2 clarifying and focusing where I think some of the stickier
3 factual issues are.

4 With respect to Rule 37 and whether or not intent has
5 been demonstrated or if there's non-intent prejudice, I think
6 from my perspective, if there's not intent, I do think there is
7 prejudice that's been demonstrated. But I guess I focused on
8 whether or not this is intentional. And so what is your best -
9 - marshaling your best evidence, your best facts, what is the
10 evidence of intent?

11 **MS. WOLFF:** Sure, thank you, your Honor. So let's
12 take the Defendants one at a time. With respect to Sang Lee,
13 we know that he lied at his deposition about texting with a
14 codefendant about the subject of this lawsuit. We've discussed
15 some of those texts today and they're in our papers, our moving
16 papers and our reply papers. He exchanged text messages with
17 Angelo Ferrara on January 29th, and Michael Papayans and others
18 on January 29th as well. Those are the only ones that we've
19 been able to recover. There certainly are more. And it -- so
20 that shows though that he had something to hide at his
21 deposition. The destruction of these -- and we know that he,
22 you know, deleted those strings of text messages with his
23 codefendants. So I would say that the combination of his
24 destruction of that evidence with the lie at his deposition
25 about the existence of that evidence can infer that there was

1 an intent to deprive Plaintiffs of that content.

2 Now, Charlie and Frank similarly lied about the
3 existence of any text messages with codefendants in their
4 document responses -- I'm sorry, their responses to the
5 document requests. Plaintiffs pressed these Defendants for
6 seven months to produce that information that we knew existed.
7 And during that delay, that seven months before we finally
8 involved the Court, the data was being deleted by their
9 cellphone carrier. They could have simply downloaded these
10 bills and that wouldn't have been an issue. But the bigger
11 issue with Charlie, and with Frank to an extent as well, is
12 that he purged his cellphone. He got rid of his cellphone four
13 or five months after the lawsuit was filed. And I -- that
14 alone can show his intent to just get rid of the evidence. We
15 submitted evidence of a text that went out to one of their
16 codefendants the day the lawsuit was filed. "Hopefully there's
17 no evidence hint, hint." And then Charlie, Frank, and Sang Lee
18 all had communications with that same Defendant who received
19 that text message. Those are all in my declaration.

20 And, you know, the fact that Frank also got a new
21 cellphone in November of 2016 -- and, by the way, we were just
22 informed of that several weeks ago, in September -- and the old
23 cellphone that he just discovered was in use during the
24 January, February timeframe. In fact, it was in use all the
25 way up until November of 2016. Of course we've reviewed that

1 extraction report which we received at the end of September and
2 there's nothing on that phone before the lawsuit was filed.
3 And in fact the majority of the communications occur in the
4 fall of 2016, suggesting that that phone has been wiped of all
5 information from that time period. They were on notice at the
6 time of these events occurring that they should have been
7 preserving evidence. And the fact that it was destroyed
8 satisfies the intent requirement.

9 The mere spoliation of evidence creates a presumption
10 that the evidence goes to the merits of this case. And
11 willfulness, the intent portion, can be established by
12 satisfying that the spoliating (phonetic) party had some notice
13 that the documents were just potentially relevant to the
14 litigation. That's the *Perez versus Shippers Transport Express*
15 case. And so here there's no dispute that the evidence is
16 gone, that they had an obligation to preserve it, and that
17 alone is sufficient to establish intent, irrespective of these
18 other facts that show their intent.

19 **THE COURT:** All right, thank you.

20 **MS. WOLFF:** Thank you.

21 **THE COURT:** All right --

22 **MS. LUTZ:** May I be heard, your Honor?

23 **THE COURT:** Yes, please.

24 **MS. LUTZ:** First, in regards to whether or not
25 Defendant Lee took reasonable steps in order to do the

1 preservation, I would note before any other Defendant, Mr. Lee
2 was the first one to produce his extraction report. Granted we
3 had it with the privilege log, but he's entitled to do that.
4 Plaintiffs were aware that there was an extraction report very
5 early on in this case. Eventually the extraction report was
6 produced in its entirety. Mr. Lee produced his cellphone
7 records almost a year ago. He's been compliant with all of
8 these discovery requests. Not only that, he's had multiple
9 tests done on his phone since then in order to try and find
10 these text messages. The fact that there are text messages in
11 July that are not recoverable after I would say the duty to
12 preserve attached, Sang Lee is not aware of this overwriting
13 system on the phone. There was no reason that he would be
14 aware of that. And it doesn't mean that he didn't take
15 reasonable steps. To him, as long as he didn't delete the
16 information, that's preserving the information. And I would
17 note in advisory notes it states that the Court must also be
18 sensitive to a party's sophistication to litigation,
19 particularly involving individual litigants who are less
20 familiar with preservation obligations. Defendant Lee is a
21 roofer. He has no background in computer technology
22 whatsoever. To him, as long as he doesn't delete those text
23 messages, he's preserving the information on his cellphone.

24 **THE COURT:** Well, let me ask you though, let me
25 interrupt you. What am I to make then of the inaccuracies

1 which you can characterize different ways about his deposition
2 testimony regarding whether or not he had communications?

3 **MS. LUTZ:** So there's the communications between
4 Defendant Lee and Mr. Ferrara on -- or, excuse me, because
5 Frank Ferrara and Charlie Ferrara on July 29th, 2016. And I
6 believe there's only three text messages that day. We can't
7 assume that those are in regards to the lawsuit. In regards to
8 the text messages produced by Mr. Papayans, again, I have to
9 say none of these text messages are in Mr. Lee's extraction
10 report or on his T-Mobile cellphone records. There's no -- so
11 there's no indication that he even received these text
12 messages. In fact, we have to believe that he didn't receive
13 them because it's not in any -- and just because they're on
14 Mr. Papayans's phone records doesn't mean that Mr. Lee received
15 the text messages, because they're not on any of his phone
16 records.

17 **THE COURT:** So you would -- so I guess your response
18 then is it's not clear to you that there -- his testimony is
19 inaccurate then.

20 **MS. LUTZ:** Exactly, yes, your Honor.

21 **THE COURT:** Okay, all right. I apologize, I
22 interrupted you. I -- but I just --

23 **MS. LUTZ:** That's fine. I would just also say as far
24 as to the deletion, you know, all of the experts, if you want
25 to call them that, all the parties (phonetic) today have given

1 declarations regarding, all say the same thing, that this
2 happens. There's an overwriting system when there's not enough
3 storage on the phone that the phone overwrites itself. There's
4 no indication that Mr. Lee had any of these speeding up
5 processes on his phone or wiping of his cellphone. It's simply
6 that the text messages were unrecoverable. And I would note in
7 Defendant Lee's extraction report, we can see even if a text
8 message is unrecoverable, it tells us whether or not it was
9 flagged as deleted. And none of the text messages between
10 Mr. Lee and the codefendants, any of the codefendants in this
11 matter, were flagged as deleted. There are literally hundreds
12 of other text messages between Mr. Lee and other people
13 unrelated to this suit that also were unrecoverable. There's
14 over I think 800 text messages that are all unrecoverable. And
15 some of them are deleted and some of them are not. But, again,
16 none of the ones between Mr. Lee and any of the codefendants
17 were marked as deleted, so there's no indication that he had
18 some sort of ill will or ill intent to try and get these
19 messages off of his phone. They were just simply overwritten
20 by the phone itself.

21 **THE COURT:** Okay, all right --

22 **MS. HURLEY:** And, your Honor, I --

23 **THE COURT:** -- Ms. Hurley?

24 **MS. HURLEY:** -- building off of what counsel just
25 said, the same is very true for the -- for Frank Ferrara's

1 extraction reports. There's nothing indicating wiping software
2 in addition to the evidence that hundreds and hundreds of other
3 emails and texts were also deleted from the phone. There's no
4 evidence of intent to delete that information. These are
5 laypeople that do not have sophistication in matters of
6 electronics and what their phones are actually doing on the
7 inside. So to infer intent from Frank Ferrara's failure to
8 preserve text messages that are not -- by the evidence
9 submitted by the experts are not intentionally deleted is going
10 I believe a step beyond what the evidence would allow the
11 finding to be under the circumstances.

12 And when counsel says Charlie Ferrara purged his
13 cellphone, I think the word "purge" was designed to sort of
14 confuse us into believing that Charlie deleted phones. But
15 counsel's only referring to Charlie Ferrara actually trading in
16 his cellphone and physically giving it away to his new
17 provider; because he didn't purge any cellphone. The cellphone
18 that had the text messages for the relevant time period is
19 traded away and is gone and not available for extraction
20 because that happened in, again, August of 2016, before his
21 appearance in this action and before his evidence preservation
22 obligation attached.

23 You know, there's just -- again, there's no evidence
24 that either one of these Defendants intentionally deleted
25 anything. And couple that with the fact that there's just no

1 evidence in the hundreds of thousands I believe at this point
2 in pages in extraction reports, or at least tens of thousands,
3 showing that either of the Ferraras communicated with anyone on
4 the -- any topic relevant to this case is just overwhelmingly
5 in favor of believing that these other text messages were not
6 intentionally deleted for any reason related to the case;
7 because why wouldn't anything else have been deleted.

8 **MS. WOLFF:** Your Honor, if I may correct some of the
9 gross mischaracterizations of the evidence in this motion? The
10 Defendants did delete the information. All of the expert
11 declarations say that evidence -- or, sorry, that text messages
12 that are deleted are then overwritten by the phone. The phone
13 doesn't just overwrite text messages. You have to delete it
14 first. The fact that Sang Lee's extraction report for various
15 text messages may not say flagged for deletion, that's
16 explained in the declaration of William Kellerman in paragraph
17 six where he says that different parts of the message are
18 overwritten at different times based on the structure of the
19 database. That means that that's why some of the messages that
20 have been deleted, you can see the date and the time and not
21 the content of the message. That's the same reason why you
22 can't see whether it was flagged for deletion or not. Things
23 are overwritten at different times. But it doesn't get -- it
24 doesn't just evaporate from your phone without first deleting
25 it. So it's a nonissue, it's a red herring to say that they're

1 unsophisticated and they don't know about wiping software and
2 overwriting. It doesn't matter, that doesn't -- they don't
3 need to know about that because they deleted the messages in
4 the first place. And had they not done that, then the messages
5 would still be there. The fact that they did that and then the
6 messages were overwritten, that's what's causing them not to be
7 produced at this point. But they took the initial step of
8 deleting them and that's spoliation.

9 And I think we can also infer intent here,
10 particularly on Charlie's behalf. He was instructed at his
11 deposition by his attorney in response to a line of questions
12 before I even asked those questions: "Just answer that you
13 don't know anything." I think that goes to show sort of the
14 pattern here of just discovery abuse, pretending not to know
15 anything, saying you don't have anything. And then now that
16 they've been caught in it, saying, oh, they're unsophisticated,
17 they don't know. They know not to delete evidence, and yet
18 that's what happened here. Charlie got rid of a cellphone
19 months after the lawsuit was filed. Frank did the same thing.
20 Sang Lee's deleted over five dozen messages. And the ones that
21 -- only a handful that we've been able to recover from other
22 Defendants since they were in the custody of the LAPD show that
23 they were incriminating.

24 **MS. LUTZ:** Your Honor, may I be heard?

25 **THE COURT:** Yes.

1 **MS. LUTZ:** The fact that a cellphone would overwrite
2 only deleted text messages is just blatantly untrue. There is
3 multiple reasons why a cellphone would overwrite itself, one of
4 them being storage, one of them is the fact that a text message
5 could be flagged as deleted. But in Mr. Lee's extraction
6 report, we can see which ones were flagged as deleted. And
7 granted, yes, there are some that were flagged as deleted and
8 the text messages were unrecoverable. But none of those were
9 between Mr. Lee and the codefendants. There is no indication
10 that he deleted any cellphones between -- text messages, excuse
11 me, between himself and any of the codefendants.

12 **MS. HURLEY:** And, your Honor, I would just add to
13 that, our expert declared to very similar facts, that there's
14 no evidence that these messages were deleted. And to just
15 assume they are is, again, speculation. There's no evidence
16 they were deleted. These phones are older iPhone. There can
17 situations on iPhones where it says you're -- it gives you a
18 little message when you're taking a picture or a video, it says
19 your storage is getting full, would you like to delete some
20 items. And without any intent, if you say yes to that, it can
21 delete items that are old or archived and no longer on the
22 phone.

23 And with regard to Ms. Wolff's statement about some
24 comments that were made during a deposition with Charlie having
25 an instruction not to say anything, I don't believe that's

1 before the Court in any of the documents attached to this, and
2 I'm unclear on what that relates to as relevant to this motion.
3 But if it's not before the Court in the filings, it has no
4 place in this argument.

5 And, again, your Honor, there's just a --
6 overwhelmingly the experts agree that there's no evidence of
7 wiping software. And these unsophisticated phone users could
8 easily have been accidentally allowing things to be marked as
9 deleted or overwritten or unavailable to be recovered for
10 things other than nefarious intentional reasons. And all of
11 them have testified they did not delete these items.

12 **MS. WOLFF:** Your Honor, the statements that --
13 relating to Charlie Ferrara's deposition and what he was
14 instructed by Ms. Hurley to say, that's included at -- in her
15 declaration actually, page 139 of his deposition transcript
16 which is attached to her declaration.

17 Also, the issue -- I mean, we -- while I'm happy to
18 go to the issue of were these texts deleted by them or not, at
19 some point it doesn't even matter. The evidence is gone.
20 There's no dispute about that. And we have certainly showed
21 sufficient evidence of intent by virtue of other facts
22 surrounding the deletion, including the lies at their
23 depositions, the incorrect responses to discovery requests. So
24 certainly the experts have all said that once information is
25 deleted, it's not recoverable if it's been overwritten. That's

1 -- that shouldn't be a dispute. Apparently it is. It's in the
2 declarations of all the experts. Regardless of all of that,
3 though, there's no dispute that the evidence is gone. And
4 that's spoliation.

5 **THE COURT:** All right, thank you. I think -- is
6 there anything else? I feel like I have enough of the
7 arguments and as best we're able to pin down more about the
8 facts and the timeline. If there's anything else any of the
9 attorneys would like to say before the Court takes it under
10 submission, now is your opportunity. Why don't I begin first
11 with you, Ms. Wolff?

12 **MS. WOLFF:** Thank you, your Honor. I think that, you
13 know, that the critical issue here is that the missing
14 discovery goes to the heart of Plaintiffs' case. We've alleged
15 that the Defendants have engaged in a conspiracy to exclude
16 outsiders from a public beach and that they have done so
17 through coordinating by cellphone, text messages, phone calls,
18 emails. And that's exactly the type of communications that are
19 critical to our allegations, and those are the communications
20 that have gone missing. I think that we have submitted
21 sufficient evidence demonstrating when their preservation
22 obligations arose. They've testified that they had
23 conversations right after the lawsuit was filed. There's
24 newspaper articles describing the allegations in the complaint,
25 and they're quoted in those articles responding to those

1 allegations. There's multiple, multiple phone calls, text
2 messages, right around the time the complaint was filed. They
3 knew about this lawsuit. It's a small community, they knew
4 about this lawsuit. It's on the -- it's in the *L. A. Times*.
5 And they had an obligation to preserve their evidence. It
6 doesn't matter ultimately when they were served, when they
7 retained an attorney. That's not the standard. The standard
8 is when you become aware of potential lawsuit. They became
9 aware of the actual lawsuit and that's when their obligation
10 arose. It's clear that they didn't -- at least for Charlie and
11 Frank, they didn't even make an effort to preserve evidence
12 until just a few months ago when they were ordered to do so by
13 this Court. Up until that point, there had not even been an
14 attempt to preserve. And, in fact, there had been, you know,
15 blatant discovery abuses by denying the existence of the
16 information in the first place.

17 And similarly with respect to Sang Lee, while he did
18 produce a privilege log demonstrating, by the way, that he
19 thought the communications were relevant if they were included
20 in a privilege log, that he did include that log but, you know,
21 the content's missing. And he testified at his deposition that
22 he never communicated with anybody about the lawsuit, and then
23 we find text messages a week ago that he did.

24 So there's certainly this intent that the Defendants
25 here have demonstrated an ongoing obstruction and hiding of

1 evidence, deleting of evidence. And that intent has prejudiced
2 the Plaintiffs where the heart of our case is about their
3 communications relating to a conspiracy. If the Ferrara
4 Defendants are going to be argue at trial as they did in their
5 summary judgment motion, that there's no evidence of this, then
6 they are benefitting from their misdeeds, from their bad acts
7 of deleting this critical evidence. And that's simply -- it's
8 unfair, it's unjust, and it's not what the rules and what the
9 case law permits.

10 Same with Sang Lee, he's -- it's shown repeatedly his
11 intent to deprive Plaintiffs of this information. It's gone.
12 And for him to say that I -- you know, I didn't understand how
13 my cellphone worked, it's not true and it's irrelevant because
14 it's gone and he should have preserved it. And he didn't do
15 that. He deleted texts that were incriminating.

16 And these types of sharp practices by these
17 Defendants should not be rewarded by the Court, where they are
18 able to delete, hide, obstruct and, you know, and then, all
19 right, well, maybe you have to withdraw your MSJ but you can
20 still go to trial and say that there's no evidence of any
21 wrongdoing. That's rewarding these bad practices.

22 **THE COURT:** Thank you.

23 **MS. WOLFF:** Thank you.

24 **THE COURT:** Ms. Lutz?

25 **MS. LUTZ:** Your Honor, I think that one of the things

1 we have to consider here is to beware of kind of this swirling
2 of evidence in regards to Defendants Charlie and Defendants
3 Frank and to Mr. Lee and to look at Mr. Lee as individually.
4 Mr. Lee preserved and imaged his cellphone within 30 days of
5 answering the complaint. He produced his cellphone records
6 from T-Mobile almost a year ago. And he's done numerous tests
7 on his cellphone in order to try and find these text messages.
8 He -- there's no evidence that he deleted these text messages
9 as I believe I have said numerous times in today's hearing. If
10 the Court looks at the extraction report itself, you can see
11 which ones were deleted and which ones were not. And there's
12 no evidence that any of the messages exchanged between Mr. Lee
13 and his codefendants were deleted. He acted reasonably in
14 trying to prove -- preserve the information on his cellphone by
15 imaging that phone. Mr. Lee again is a roofer and he doesn't
16 have any means of knowing how to preserve these text messages
17 outside of doing that, and not to delete them. And that's
18 exactly what Mr. Lee did in this case.

19 This is a trier of fact for the jury to decide on.
20 The fact of communications and phone calls and text messages
21 between and among all of the codefendants is easily something
22 that a jury can decide for themselves as far as what that means
23 and whether or not that means a conspiracy existed. And they
24 deserve to have that information. Thank you.

25 **THE COURT:** Thank you. All right, Ms. Hurley?

1 **MS. HURLEY:** And, your Honor, thank you for taking
2 the time to listen to our arguments, and I do appreciate it.
3 And I -- again, we are not attempting to say that the conduct
4 that occurred earlier in the case is excused. What I am saying
5 is that since the issue was corrected, there are literally only
6 three items that have not been produced by the Ferraras. And,
7 again, they should also be treated separately from every other
8 defendant in this case. So Charlie Ferrara has not produced 14
9 days of relevant cellphone billing records from Sprint that I
10 have requested and that I will turn over the minute I have
11 them. I'm actually going to turn over more but there are only
12 14 relevant days of cell records. We'll turn over the entire
13 two-month period that goes back to December, 2015, since it was
14 responsive to the discovery request. Charlie Ferrara has not
15 produced six text messages because the cellular data that those
16 were stored on were contained on a cellphone that he traded in
17 before he had a preservation duty in August of 2015, because as
18 a layperson he did not have the immense understanding and
19 obligation that Plaintiffs suggest to preserve that phone at
20 that time and destroyed it without a culpable state of mind,
21 which is required for some of these findings.

22 Frank Ferrara has actually produced every single
23 thing requested of him, with the exception of the contents of
24 nine text messages. That's it. We're literally talking about
25 nine text messages and no other evidence tying Frank Ferrara to

1 this case. And Plaintiffs have just failed to establish given
2 the fact that the phones are not deleted on purpose, that
3 there's no evidence of data being purposely destroyed, there's
4 no evidence of a culpable state of mind. They have not
5 demonstrated either of the Ferraras acted with intent to
6 deprive of the information. And the actions since July of 2017
7 have shown that there have been major efforts to obtain and
8 provide that information to the Plaintiffs for everybody's use
9 in the case, simply to be in full compliance with the discovery
10 obligation. But setting that aside, there's just no culpable
11 state of mind. And at worst, the parties involved in this were
12 negligent in not retaining this information. To infer a
13 culpable state of mind upon either of them based on the facts
14 and the totality of the evidence and what they knew when they
15 knew it has to be at worst negligent. And when there is a
16 negligence reason for evidence being missing, there cannot be a
17 harsh spoliation order issued such as the ones Plaintiffs are
18 requesting here. Again, this would be the death knell for
19 Frank Ferrara and Charlie Ferrara's defense, despite the fact
20 that there is no evidence, other than these few bits of missing
21 information, that they participated in this case in any way.
22 So to award any of the relief requested in terms of an
23 evidentiary sanction or finding of fact is just not justified
24 or supported under the circumstances, and Plaintiffs haven't
25 carried the burden of proof required for either -- any of the

1 awards requested.

2 **THE COURT:** Let me ask you though on -- for you,
3 Ms. Hurley. The -- if there's no intent but there is prejudice
4 and the rule speaks to a lesser sanction, what would your --
5 what do you think a fair sanction would be if -- now it sounds
6 like what you're proposing is that -- or not necessarily
7 proposing but discussing is that this evidence of arguable
8 spoliation or -- and prejudice should be put in front of the
9 jury. How is that really a sanction?

10 **MS. HURLEY:** Well, your Honor, I -- my argument would
11 be that -- again, and I know counsel for Plaintiff disagrees,
12 but this was addressed in a sanctions motion that the Ferraras
13 lost and were ordered to compensate the Plaintiffs for that
14 monetarily. And that's precisely what these cases contemplate,
15 where an evidentiary sanction is not sufficient, something like
16 a monetary sanction can be. And we have paid that price for
17 the conduct that's complained of in this motion.

18 **THE COURT:** Well, the sanction order though was going
19 to be -- was directed -- if -- and correct me if I'm wrong, to
20 compensating Ms. Wolff and her firm for costs incurred and
21 associated with having to bring your clients in to compliance
22 with the Court's order. This is now different if there's
23 spoliation. How -- is this somehow the field leveled to
24 address the prejudice that has resulted?

25 **MS. HURLEY:** Again, your Honor, the Plaintiffs use

1 the information showing that our clients did something
2 nefarious, that they believed they have at the time of trial
3 and present it to the trier of fact to show that our clients
4 should not be believed. That's the way you use this
5 information and --

6 **THE COURT:** But that's information that they could
7 have -- they would have already been able to arguably put that
8 on.

9 **MS. HURLEY:** Arguably. But, your Honor, again, --

10 **THE COURT:** So the sanction is that they get to put
11 on this evidence that they probably already could have put on
12 anyway?

13 **MS. HURLEY:** Well, your Honor, again, I disagree that
14 this is conduct that rises to the level of sanctions,
15 evidentiary sanctions, because I don't believe Plaintiffs have
16 carried their burden to establish especially that Charlie
17 Ferrara had any reason to preserve that cellphone on the date
18 that he traded it in for a different cellphone in August of
19 2015. The only other Charlie Ferrara issue are 14 days of
20 cellular phone billing records that will not establish what he
21 was saying to any Defendant. And if any --

22 **THE COURT:** But it would show contact.

23 **MS. HURLEY:** It could show contact, yes. But that
24 would still not be sufficient to establish a conspiracy. It
25 would be established -- it would establish potentially he spoke

1 with people who were involved in the case, or perhaps he
2 didn't. But the sanction that's appropriate is simply allowing
3 the Plaintiffs to argue that Charlie did off of the other
4 records that other parties have produced. This is information
5 obtainable from other documents produced in this case or that
6 other parties should have produced in this case. And, again,
7 this information should be available shortly and before trial.
8 But it's such a small amount of information. And, again, there
9 is no culpable state of mind that's been established with
10 regard to Charlie because those records were in the process of
11 being requested by counsel. So to sanction Charlie for that
12 conduct by allowing him to have a judgment against him for
13 conspiracy to assault and batter Plaintiffs who he has never
14 even had any contact with, and there's no evidence he's
15 discussed that conduct with any other Defendant, is simply
16 beyond what the rules allow.

17 **THE COURT:** I guess, no, what I'm asking for is what
18 would a lesser sanction be?

19 **MS. HURLEY:** I think the lesser sanction would be no
20 sanction. And perhaps it's the mildest sanction that the
21 Plaintiffs requested, which is they -- he gets his MSJ denied.

22 **THE COURT:** All right, thank you very much. You
23 spent a great deal of time down here and I appreciate it. I
24 will take the motion under submission. Thank you.

25 **MS. WOLFF:** Thank you, your Honor.

MS. LUTZ: Thank you, your Honor.

MR. SPEAKER: Thank you, your Honor.

(This proceeding was adjourned at 11:55 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



November 2, 2017

TONI HUDSON, TRANSCRIBER